

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MARIA GALLEGOS MORALES

Claimant

VS.

WAL-MART

Respondent

AND

INS. CO. OF STATE OF PENNSYLVANIA

Insurance Carrier

Docket No. **1,049,348**

ORDER

Claimant requested review of the September 19, 2012, Award by Administrative Law Judge (ALJ) William G. Belden. The Board heard oral argument on February 20, 2013.

APPEARANCES

Conn Felix Sanchez of Kansas City, Kansas, appeared for claimant. Michael R. Kauphusman of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has considered the entire record and adopts the stipulations listed in the Award.

ISSUES

The ALJ found claimant sustained personal injury by accident arising out of and in the course of her employment with respondent on October 2, 2009. The ALJ further found claimant's average weekly wage was \$195.22 and that her permanent partial impairment of function was 20% to the right forearm.

Claimant maintains the ALJ erred in determining the nature and extent of her disability. Claimant argues she is permanently and totally disabled because of a back injury she sustained in a previous claim for a June 2, 2009 accidental injury, Docket No.1,046,556.¹ and the right upper extremity injury in this claim. Claimant also contends the ALJ erred in applying an offset, pursuant to K.S.A. 44-501(h), against the Award by reason of claimant's receipt of social security retirement benefits. Claimant maintains that because she was receiving social security retirement benefits before she sustained the work-related back injury on June 2, 2009, respondent is not entitled to the offset.

Respondent raises the following issues: (1) whether claimant sustained personal injury by accident arising out of and in the course of her employment with respondent; (2) average weekly wage; (3) nature and extent of claimant's disability; (4) whether the social security retirement offset set forth in K.S.A. 44-501(h) is applicable to this claim; (5) whether temporary total disability benefits (TTD) were overpaid and in what manner respondent's credit, if any, should be applied to the Award; and, (6) whether claimant is entitled to unauthorized and future medical benefits.

The issues for the Board to determine are:

1.) Whether claimant sustained personal injury by accident arising out of and in the course of her employment with respondent.

2.) Average weekly wage.

3.) Nature and extent of claimant's disability.

4.) Whether respondent is entitled to a credit for overpaid TTD and in what manner any such credit should be applied.

5.) Whether the social security retirement offset pursuant to K.S.A. 44-501(h) is applicable to this claim.

6.) Whether claimant is entitled to unauthorized and future medical benefits.

FINDINGS OF FACT

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings:

¹ This claim is still pending and has not been consolidated with the current claim.

The Board finds that Judge Belden's findings of fact are supported by a preponderance of the credible evidence and are accordingly fully adopted as though such findings were specifically set forth in this Order.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2009 Supp. 44-501(h) states:

If the employee is receiving retirement benefits under the federal social security act or retirement benefits from any other retirement system, program or plan which is provided by the employer against which the claim is being made, any compensation benefit payments which the employee is eligible to receive under the workers compensation act for such claim shall be reduced by the weekly equivalent amount of the total amount of all such retirement benefits, less any portion of any such retirement benefit, other than retirement benefits under the federal social security act, that is attributable to payments or contributions made by the employee, but in no event shall the workers compensation benefit be less than the workers compensation benefit payable for the employee's percentage of functional impairment.

K.S.A 2009 Supp. 44-525(c) provides:

In the event the employee has been overpaid temporary total disability benefits as described in subsection (b) of K.S.A. 44-534a, and amendments thereto, and the employee is entitled to additional disability benefits, the administrative law judge shall provide for the application of a credit against such benefits. The credit shall first be applied to the final week of any such additional disability benefit award and then to each preceding week until the credit is exhausted.

The Board also adopts the conclusions of law contained in the Award, with the exception of the ALJ's conclusion and computation regarding the retirement benefit offset, which the Board modifies as discussed below.

Claimant's accident on October 2, 2009, resulted in a single scheduled injury to the right forearm, and is therefore governed by K.S.A. 2009 Supp. 44-510d. As a result, claimant is not entitled to an award of general body disability benefits or permanent total disability benefits. However, as found by the ALJ and adopted by the Board, claimant is entitled to permanent partial disability (PPD) based on her functional impairment of 20% to the right forearm.

The ALJ's Award found the 45 weeks of TTD already paid by respondent should be offset by the weekly value of the social security retirement payments claimant received during the 45 weeks TTD was paid, pursuant to K.S.A. 44-501(h). To apply the retirement benefit offset, Judge Belden reduced the weekly compensation rate for the 45 weeks from the \$130.15 per week at which the TTD was actually paid to \$63.23 per week. The ALJ found the total Award, including the TTD at the reduced weekly rate, and claimant's PPD

for a 20% functional impairment to the right forearm, was \$6,880 (\$2,845.35 in TTD plus \$4,034.65 in PPD based on a 20% loss of use of the right forearm).

The Board disagrees with the ALJ's conclusion and computation of the Award for two reasons:

(1) The ALJ awarded TTD for 45 weeks at the reduced rate of \$63.23 per week, totaling \$2,845.35, thus applying the retirement benefit offset to the weeks of TTD paid. The total Award of \$6,880 was all due and owing when the Award was entered and the ALJ ordered the \$6,880 paid in one lump sum "less compensation previously paid." The only amount of "compensation previously paid" was the 45 weeks of TTD at \$130.15 per week, totaling \$5,856.75, which includes that portion of the TTD already offset against the weekly TTD rate. By applying the offset against the TTD and again applying the offset against the total award, respondent received a "double" offset to which it is not entitled.

(2) Moreover, under the method the retirement benefit offset was applied by the ALJ, claimant ends up receiving an award less than the value of her functional impairment. The Award entered by the ALJ computes as follows:

CALCULATION	AMOUNT
TTD awarded (45 weeks @ \$63.23)	\$2,845.35
Plus PPD based on functional impairment (200 weeks of TTD = 155 x 20% = 31 weeks @ \$130.15)	\$4,034.65
Total Award	\$6,880.00
Less "compensation previously paid" (45 weeks @ \$130.15)	\$5,856.75
Amount of compensation claimant receives	\$1,023.25

Obviously, \$1,023.25 is less than the value of claimant's functional impairment, \$4,034.65. The Board has made clear in previous claims that the K.S.A. 44-501(h) retirement benefit offset may not be applied to TTD if doing so reduces claimant's benefits below the value of claimant's functional impairment.² In *Hoesli*,³ the Board held:

Functional impairment [for general body disabilities] is calculated pursuant to the instructions contained in K.S.A 2009 Supp. 44-510e(a)(1)(2)(3). Functional impairment

² See, e.g., *Miller v. WalMart*, No. 1,050,117, 2012 WL 1652958 (KW CAB Apr. 13, 2012).

³ *Hoesli v. Triplett, Inc.*, No. 1,056,540, 2013 WL 485706 (KW CAB Jan. 29, 2013).

cannot be calculated without first taking into consideration the TTD awarded. If respondent is granted an offset against the TTD awarded, the amount of functional impairment will be impacted, ultimately violating K.S.A 2009 Supp. 44-501(h). The Award will not be modified to offset claimant's TTD by his weekly social security benefit.⁴

The comments made in the concurring opinion in *Hoesli* are also noteworthy:

The undersigned Board Member agrees that an offset for temporary total disability is inappropriate. If respondent were to be granted an offset against the temporary total disability awarded, the amount of his award for functional impairment would be impacted. While K.S.A. 2009 Supp. 44-501(h) states that all compensation benefits shall be reduced by the weekly equivalent amount of social security retirement benefits, the statute forbids claimant from receiving less than the workers compensation benefit payable for his percentage of functional impairment.

Following the literal language of K.S.A. 2009 Supp. 44-501(h), claimant's temporary total disability benefits could be reduced by his receipt of social security benefits. If he received more temporary total disability compensation than he was entitled to receive, or such temporary total disability compensation should have been totally disallowed, K.S.A. 2000 Furse 44-525(c) directs that a credit be taken from claimant's entitlement to any additional disability benefits. The only additional disability benefits would be claimant's permanent partial disability payments for functional impairment. Claimant's entitlement to permanent partial disability benefits could be reduced by a possible social security offset for his having received temporary total disability payments he was not entitled to receive. Therefore, K.S.A. 2000 Furse 44-525(c) would be directing a result contrary to the specific prohibition in K.S.A. 2009 Supp. 44-501(h) that claimant can not receive less than the benefit payable for his percentage of functional impairment. The more specific statute, K.S.A. 2009 Supp. 44-501(h), controls over the more general statute, K.S.A. 2000 Furse 44-525(c). Claimant's temporary total disability benefits should not be offset by his weekly social security benefit.⁵

For these reasons, the Board modifies the ALJ's conclusions of law regarding the retirement benefit offset as set forth in this Order. The "Award" section below corrects the calculations in the ALJ's decision.

⁴ *Hoesli* at 10-11.

⁵ *Hoesli* at 12-13.

CONCLUSIONS OF LAW

The Board adopts the ALJ's findings of fact and conclusions of law, except as modified herein. Other than the modification made by the Board, the Award is affirmed in all other respects.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.⁶ Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, it is the Board's decision that the Award of ALJ William G. Belden dated September 19, 2012, is modified as detailed in this Order and is affirmed in all other respects.

Claimant is entitled to 45 weeks of TTD benefits at the rate of \$130.15 per week or \$5,856.75 followed by 31 weeks of PPD benefits at the rate of \$130.15 per week or \$4,034.65 for a 20% permanent functional impairment to the right forearm, for a total award of \$9,891.40, which is ordered paid in one lump sum less amounts (\$5,856.75) previously paid.

IT IS SO ORDERED.

Dated this 31st day of May, 2013.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

⁶ K.S.A. 2009 Supp. 44-555c(k).

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William G. Belden, ALJ